

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
IN RE NEW YORK CITY POLICING : Docket #20cv8924
DURING SUMMER 2020 DEMONSTRATIONS :
: New York, New York
: September 20, 2021
----- : TELEPHONE CONFERENCE

PROCEEDINGS BEFORE
THE HONORABLE GABRIEL W. GORENSTEIN,
UNITED STATES MAGISTRATE JUDGE

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E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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THE CLERK: This is In Re New York City Policing During Summer 2020 Demonstrations, case number 20cv8924. Will counsel please state their appearances for the record, starting with plaintiff.

MS. SWATI PRAKASH: Good afternoon, this is Swati Prakash with the Office of the New York State Attorney General for plaintiffs People and the State of the New York.

MS. MOLLY BIKLEN: And this is Molly Biklen of the New York Civil Liberties Union Foundation for the Payne plaintiffs.

MR. DOUGLAS LIEB: Douglas Lieb for plaintiff Charles Henry Wood.

MR. ROB RICKNER: Rob Rickner, Rickner PLLC, for the Sierra plaintiffs.

MX. REMY GREEN: Remy Green, Cohen & Green, for the Sow plaintiffs, and I'll be speaking on the ESI communication issues. For the reporter I should appear in the transcript as Mx. Green, spelled M-X period rather than Mr. or Ms.

MR. ANDREW STOLL: Andrew Stoll, Stoll, Glickman & Bellina, for Cameron Yates. Good afternoon again.

THE COURT: For defendant.

MR. ANTHONY DiSENSO: Good afternoon, again, Your

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Honor, this is Anthony DiSenso from the New York City Law Department. I'll be speaking on the ESI portion of the conference.

MS. STEPHANIE BRESLOW: Good afternoon, Your Honor, this is Stephanie - sorry - this is Stephanie Breslow from the City Law Department for defendants.

MS. DARA WEISS: And Dara Weiss from the New York City Law Department.

THE COURT: Okay, we're going to do this over again, and I should have started the other one by saying that this is being recorded. Any rebroadcast or recording of this proceeding by any other party is not permitted.

We have two issues, one relating to ESI and the other relating to a 30(b)(6) deposition. As I said before, I want to start with the ESI issue. And I think there's two aspects to it: One is the timing and the other is the methodology. I know that the plaintiffs are a little bit at a disadvantage because the defendants, you know, appears that the most complete statement about what's going on just happened on Friday, but let's see what we can accomplish now. So, Mx. Green, why don't you go ahead.

MX. GREEN: Sure, Your Honor, and as you said before, we reset. I think the biggest problem, as far as this goes, is that what's going on timing-wise is not even

1
2 nominally compliant with the Court's schedule. You ordered
3 at docket 43 that the parties shall not require a deponent
4 to appear for a deposition after December 3. All motions
5 have to be made 30 days before December 31, and 11 weeks
6 from September 27, which is when they said they would be at
7 the earliest they will complete production, is mid to late
8 December. I'm sorry, it's just mid-December, it's December
9 13.

10 It's also not compliant with the schedule Judge
11 McMahon ordered. At docket 40 she specifically said if
12 it's necessary to shorten periods for responding to
13 discovery in order to meet the deadline, that should be
14 done.

15 So I mean I think the biggest question we have
16 is, you know, how do we get this done, and I think zooming
17 out a little bit, it's a problem we've had throughout the
18 case. I don't think that we are in a position to be
19 meeting the Court's schedule for any number of reasons.
20 You know, we bring as many issues as we can as quickly as
21 we can to the Court when we know that there are going to be
22 issues. But it's just - we are rolling towards disaster I
23 think. I don't know how to address it other than to say I
24 think what we care most about is timing, and, you know,
25 getting an expert opinion without emails is just not

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possible, let alone taking the remaining depositions without them. So that's where I'll stop for now at least.

THE COURT: All right, Mr. DiSenso or whoever's speaking for defendants.

MR. DiSENSO: Yes, Your Honor, this is Mr. DiSenso. As we said in our letter on Friday, we recognize the significant challenges that our estimate for review and production poses in this case. I can say, you know, and reiterate some of the points in the letter, that this is, you know, we are anticipating and preparing for this to be a very aggressive review schedule. A review team of 20 people, which is what we currently estimate hiring, is a very large team. And we are trying to find a way to do this as quickly and as efficiently as possible. That's one of the reasons why we're planning on leveraging both a managed review team and the use of technology assisted review.

As far as why it's going to take so long I think is a factor of the number of custodians we have here. We have 50 custodians. That is a huge number of people to collect from. And I realize that this is only for a fairly short date range, but, you know, as you can see, 50 custodians still yielded over a million documents collected. And we have been working for the past few weeks

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to come up with a way to come up with a way to deal with
that volume.

THE COURT: First of all, Mx. Green for some
reason measured your 11 weeks from the 27th. I measured it
from the 17th. What are you measuring it from?

MX. GREEN: Sorry, Your Honor, was that for me
or Mr. DiSenso?

THE COURT: No, that's for Mr. DiSenso.

MR. DiSENSO: Oh, I apologize, Your Honor. That
would be from the date of the Court conference I believe.

THE COURT: Meaning today.

MR. DiSENSO: Yes, Your Honor.

THE COURT: Okay. And just so I understand,
these 20 attorneys are contract attorneys that you're
hiring specifically for this case?

MR. DiSENSO: Yes.

THE COURT: And your expectation is, you're
assuming that you're going to get down to 100,000
documents, is that what it is?

MR. DiSENSO: That is our - it is - I will
emphasize this point that we believe - you know, it's very
hard to estimate a set number of documents when you're
using technology assisted review. We go based on estimated
on our sampling. We have a 95 percent confidence level,

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1 but there is a margin of error, but with a document set
2 this large that means that there can be some significant
3 variance in the number of documents we ultimately need to
4 review. And for that reason we've tried to take that into
5 account as much as we can in estimating that 11-week
6 timeframe. But it's --

7 (interposing)

8 MR. DiSENSO: It's hard for me to give you a
9 number of documents we will ultimately end up reviewing.

10 THE COURT: I mean we need to talk about the
11 timeframe. You're hiring these people as contract
12 attorneys. I certainly understand that you need to have
13 (indiscernible) again --

14 MR. DiSENSO: Yes.

15 THE COURT: -- and you need to have quality
16 control. I mean it sounds like if I take 11 weeks times 40
17 hours times 20 attorneys, I get something like, let's see,
18 8800 hours of attorney time. Did I do the math right?

19 MR. DiSENSO: Apologies, Your Honor, I will take
20 --

21 THE COURT: Some of the time is devoted, some of
22 the time is devoted to training, so I'm not saying you'll
23 use all that time. So if it was a week of training or
24 whatever, it would be 10 weeks times 40 hours times 20
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attorneys would be 8,000 hours.

MR. DiSENSO: I can provide a little bit more detail in how that 11 weeks breaks down. Again, we're anticipating here and again this is a very aggressive schedule, you know, hiring and training a review team within one week. And then we think that after that the review will, the stages of the review will take approximately seven weeks' worth of time for the review team. There are numbers after that including the fact that we need to validate that the review was successful in finding responsive documents. That takes some additional time.

We have some quality control that's not necessarily related to the review team's review, you know, coding documents correctly. But related to the fact that there may be coding conflicts, you know, for example, a document responsive in privilege but, you know, without a privilege call on it. Given the volume, we estimate that that would take an additional week. There are also a number of holidays in between now and December that we have to account for in that. And we also anticipate, and we're factoring a time for actual production here, production takes, you know, quite a bit of time when you're dealing with this many documents. It's just machine time and also

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2 QC time to make sure that the production was run correctly.

3 We anticipate that that would take between one and two

4 weeks.

5 THE COURT: Why does it take, why is that -

6 what's involved in production, I don't understand?

7 MR. DiSENSO: When we run --

8 THE COURT: I'm assuming you're not printing

9 this out. You're, you know, applying - I don't know what

10 you're doing to it. What does production mean?

11 MR. DiSENSO: So under the agreed-upon format

12 what we're doing is we are applying - and we're actually

13 essentially creating TIFF images of all of the emails and

14 the attachments and also creating an extracted text file

15 for each one of the documents we've produced for Excel

16 spreadsheets we're producing natively, but they're like not

17 the original native but a version of the native. We're

18 also producing various what are called DAT files which

19 allow basically the database to understand how to organize

20 and assemble document families and also provide metadata

21 associated with each of the documents.

22 You know, depending on the size, that can take

23 multiple days to actually generate that through just

24 machine time. We always build in more time because after

25 we receive it, we have to run quality control on it to make

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2 sure that it was run correctly, and if it was not run
3 correctly, it will have to go through that process over
4 again.

5 THE COURT: Mx. Green, did you have any - let's
6 put aside the time. In terms of the methodology of being
7 used here, is there anything to be said now or is that for
8 another time?

9 MX. GREEN: You know, Your Honor, I think, I
10 don't think any of this takes anywhere near as long as Mr.
11 DiSenso is suggesting. I think in terms of the methodology
12 I have no idea if, assuming that they're going to contract
13 attorneys, I have no idea why the number is 20. Right? If
14 that's the biggest slowdown here, why aren't they hiring a
15 hundred attorneys? The math doesn't quite work out for me
16 either, right, as you said it's 8800 attorney hours if you
17 run their calculation, and with the review population
18 they've suggested, that suggests that an attorney is only
19 getting through 25 documents in an hour. Most people as a
20 rule of thumb use 100 documents per attorney per hour. So
21 the math seems a little wrong.

22 THE COURT: Well, just in fairness, I assumed
23 all 11 weeks were attorney review time, and I think they --

24 MX. GREEN: Yeah, that's --

25 THE COURT: -- made clear that that's not the

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case.

MX. GREEN: Yeah. I also, you know, it doesn't seem to me that there's any reason, as Mr. DiSenso suggests, that a rolling production should slow anything down. After all, it's just machine time. Right? They put it on the machine, it produces, that shouldn't slow down the review.

But I think, you know, the biggest objection we have is, as many documents as, you know, half a million or 250,000 as the meaningful review population relative to, you know, zero documents, relative to major cases it's nothing. Right? Like a typical white collar investigation has millions if not hundreds of millions of documents, and firms get through those on much more aggressive schedules than this regularly every day. And it's, you know, the idea of getting through a quarter of a million documents takes, it's taken them, you know, two months since we agreed on a protocol plus another three months is just, it's absurd.

And so on the methodology I think they've made a choice to say 20 attorneys. I don't know why they've made that choice. And that's probably the biggest objection we had.

THE COURT: Well, okay, so there's two issues,

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Mr. DiSenso. One is I'm not sure that you're the right person to address it which is why it took until now to get to this point. But the second one is why 20 attorneys and why not double that and then that would significantly shorten the time.

MR. DiSENSO: The reason for 20 attorneys, and I will say, reiterate my earlier point, which is that 20 attorneys is a very aggressive number of document reviewers. It is because we need to balance the number of documents reviewed per day against what the case team can QC. And, you know, as it stands right now, this is aggressive not because of the number of attorneys we're necessarily hiring, it's aggressive because of the burden that it puts on the case team on a daily basis to review the work of those attorneys.

I must say we have to do that especially where we're leveraging technology assisted review because it's important for us and for the review process to ensure that the reviewers are coding documents correctly. We don't want to be in a position where we're not doing adequate QC because we have a hundred reviewers going at once, and then we discover down the line that, you know, they're, they missed a whole bunch of documents that should've been coded responsive. So that's the reason why we are, you know,

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2 proposing 20 attorneys or at least thinking about 20
3 attorneys now.

4 If I may, Your Honor, just to address another
5 point that was raised, as far as rolling productions go,
6 the reason why that could slow things down is because it's
7 not just a factor of sending a production to the vendor and
8 to have it run, and it's just not machine time. There's a
9 number of steps which I outlined in my initial breakdown
10 that go into readying a production set. So that includes,
11 you know, coding, QC, cleanup. That includes cleanup and
12 QC of the production process. It also necessitates that we
13 take resources away from QC-ing in order to deal with those
14 coding QC issues. Based on how the review is set up, it
15 may require us to kind of pause the review while we ready a
16 production set. So that's kind of where that thinking
17 comes from, and it is based on our past experience with
18 similar models.

19 THE COURT: How many attorneys in the law
20 department are doing this quality review you're talking
21 about?

22 MR. DiSENSO: You know, I think that's still
23 being determined, but it is I believe four is what we
24 anticipate.

25 MS. WEISS: Your Honor, if I may, this is Dara

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Weiss. We have four as of now and we're working on getting a fifth. And I just want to add this is work that is going to be done in the evenings after hours. This is work that is going to be QC'd after the review team has done their work for the day, so these attorneys then have to log on at night to review their work.

THE COURT: I mean I guess that's admirable, but couldn't they log on the first thing the next morning and have essentially, you know, why does it have to be done at night?

MS. WEISS: Well, then it would have to be done before the review team starts their work at, I don't know, Anthony, whatever time the team starts work --

THE COURT: Oh, I see, you're giving them directions that would apply instantaneously, is that the point?

MR. DiSENSO: That's correct, Your Honor, and that's very important, especially where, at the beginning of a review and when we're using technology assisted review because we want to catch at the earliest part, point possible any confusion with what is relevant and make sure it's corrected so that we don't have to review large portions of the review.

MX. GREEN: Your Honor, if I may, a lot of this

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seems like, you know, perfect world type stuff. I am a little baffled by the use of technology assisted review here. This just isn't, I don't think the volume of documents where that pays off. It really - and I also find it kind of shocking the number of attorneys who are able to QC even after the Court has, I think, repeatedly told defendants they need to staff the case more robustly.

But it's, you know, I think that the answer to your question is obviously people should just be doing it during the day, and, yes, you usually have to redo the first part of a review, that's kind of normal in big document reviews. But, you know, I don't think attorneys working in the evening should be the hurdle here.

THE COURT: Well, I don't think it's being presented as a hurdle. Maybe you feel the number is a hurdle. I'm not sure that having five attorneys do this from the law department and 20 attorneys contracted is out of line with what might be expected in terms of staffing. I think it's unfortunate we've gotten to this point because I think we could have moved a lot quicker. I don't want to start assigning blame as to how we got there.

But here's where I think we should be right now. I've consulted with Judge McMahon about this, and I'm authorized to provide an appropriate extension of the

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various deadlines so that we can make sure this happens. I'm not sure I want to just announce right now and say what that is. I think it's been a big hiccup between the parties because I don't think there's no way to start, you know, when one side says, oh, I should order it produced next week and the other side says not for 11 weeks, it leaves no room for compromise. I understand from the plaintiffs' point of view, because they need it, you know, pretty soon if they're going to do all the things that they need to accomplish by the end of December. I'm not sure they would need it in one week, but they, you know, need it in a matter of just a few weeks at most.

So if I can loosen that stricture, and I said I will loosen that stricture, what I think I want to have happen is I would like to have a more serious discussion between the parties to talk about a realistic deadline for the ESI that would allow for the remaining tasks, being the experts and, you know, discovery of key individuals who might be implicated by the ESI, to have that happen after it would get produced.

It's really important that the Law Department be forthcoming about what they're doing and how they're doing it because I don't want to have a situation where you make some decision early on about relevance or something else

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and about how TAR algorithm needs to be pointed, and then it turn out that you made some decision that I later found out was unreasonable and we've lost tons of time because of that.

So knowing that we can do something on the timing, and that would apply obviously to the expert report and the class certification, I feel like that that should be an impetus to, if not coming to an agreement, at least someone giving me a more realistic proposal from the plaintiffs' side if they can't come to agreement with the defendant about what can be done and what should be done. I'm not sure I buy the idea that 20 attorney is the wrong number, and, you know, depending upon a lot of other factors here, but it's really all dependent on the City being very forthcoming with the plaintiffs as to how they're doing this, how they're staffing it, and what decisions should be made. I shouldn't have to issue orders telling the City to provide this information. The City should be very forthcoming about this.

So having said this, Mx. Green, I think you can read that I don't want to pick that date now. I suppose I'm open to a request to do that, but tell me if you have some thoughts having heard what I said.

MX. GREEN: Yes, Your Honor. I think, you know,

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2 it's hard to say what we need without knowing what
3 extension we're going to get, but I understand exactly why
4 you might not want to tell us right now. And certainly I
5 am happy to go discuss something that is a little less than
6 a week from the conference, especially given that, you
7 know, rather than - when we wrote that, I think we had in
8 mind that they might try to get ahead of it by starting
9 review while the motion was pending. But, of course, we're
10 willing to go and talk about it.

11 I think one - a couple of things that will help
12 us address this, in a meet and confer we've had today and a
13 number of meet and confers we had last week, you know,
14 whenever we ask for basic information about how the City is
15 searching for things and that sort of thing, they've
16 started saying that we don't think it's appropriate for
17 them to be discussing it with us. And they say, you know,
18 that's discovery on discovery and wildly inappropriate, and
19 they shut down. And obviously that isn't going to work.

20 I think the right thing to do might be for
21 defendants to provide status letters that they file on the
22 docket, and that way, you know, we can all make sure that
23 things are going the right way, and we don't have to
24 necessarily, you know, fight with them about what's
25 confidential because they've been designating staffing as

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2 confidential every time they tell us about it.

3 THE COURT: All right, who's going to speak - I
4 normally have one attorney per issue, but I understand I'm
5 now raising things beyond just mere ESI technicalities. So
6 whoever wants to speak from the Law Department.

7 MS. WEISS: Yes, Your Honor, this is Dara Weiss.
8 I strongly disagree with any thought of providing status
9 letters, especially filed on the docket. A lot of what
10 ends of taking the time of the attorneys for the defendant
11 is things like writing letters and participating in meet
12 and confers and responding to letters that plaintiffs
13 write, and that takes us away from the tasks of providing
14 the discovery and getting them the information that they
15 need.

16 And what we were opposed to in the meet and
17 confers that Mx. Green spoke about before was not providing
18 statuses of where we are in discovery but providing details
19 of exactly what our clients have done in the process of
20 searching for certain documents which is what defendants
21 think is inappropriate. But a matter of providing
22 plaintiffs with the status of where we are in searches and
23 how long we think it might take us to provide them with
24 things such as these emails that we're searching for now or
25 plaintiffs pointed out that there appear to be some

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documents that weren't provided, you know, providing the status of looking for those documents or status of finding and naming proper 30(b)(6) witnesses and where we are in the process of getting that done, that's absolutely fine. We have no problem with providing that information to plaintiffs.

But things like filing status reports on the docket I think is unnecessary and inappropriate.

THE COURT: Filing on the docket is not my issue. What's important, particularly for the ESI process, you know, 30(b)(6) is its own thing, but for the ESI process this has to be transparent. They have to, and maybe you want to develop a template when you finally figure out the precise process as to how many documents got reviewed or whatever it is. That is easily filled in. I assume you're going to keep track of this yourself in some way. I'm not trying to burden you. But the ESI process in particular is a break from the way things were done in the past when people just presented documents after they've done a search. The plaintiffs have to be part of that process and have to understand when choices get made that might affect them and also might affect the timing, particularly given that we're in a crunch when it comes to timing.

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So I'm not going to require it to be filed on the docket, but I almost think it would be better for you to have a template, you know, for the ESI process that you do once a week. I think it might spare you questions. I don't want to start ordering - the only thing I'm going to order is what I already did which is that you have to be completely forthcoming on this. This is a way to avoid discovery on discovery. This is not discovery on discovery. Attorneys telling the other side about the ESI process is normal. And if you end up not being forthcoming about it, then I might have to order discovery on discovery which I think would be a disaster for you. So this is a way to forestall that.

So, Ms. Weiss, having said that, is there a reaction?

MS. WEISS: That sounds reasonable and easier for both sides. I have to admit that I am by far not an expert on the e-discovery process in this office, so I don't know how it's usually done in the usual scope of a litigation, but that is why we have an e-discovery team. So I will certainly work with them to make sure that this office is transparent in the rest of the e-discovery and email collection and production process.

MR. DiSENso: Your Honor --

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, In Re: New York Policing During Summer 2020 Demonstrations, docket #20cv8924, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Date: September 23, 2021